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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

vs.

FACEBOOK, INC., a Delaware corporation; MARK ZUCKERBERG, an individual; CHRISTOPHER COX, an individual; JAVIER OLIVAN, an individual; SAMUEL LESSIN, an individual; MICHAEL VERNAL, an individual; ILYA SUKHAR, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No: CIV 533328

Assigned for all purposes to Hon. V. Raymond Swope, Dep't 23

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF SIX4THREE, LLC'S OBJECTION TO HEARING BEFORE THE HONORABLE V. RAYMOND SWOPE ON THE GROUNDS OF DISQUALIFICATION (CAL. CODE CIV. PRO. §§ 170.1 AND 170.3)

(UNLIMITED JURISDICTION)

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INTRODUCTION

Why is recusal and reassignment of a new judge in this (still stayed pending appellate review) case necessary? The answer is simple: the conduct and pervasive remarks of Judge Swope create a strong appearance of bias and prejudgment on motions that still – after over 8 months of threats – have not been brought by Facebook. The administration of justice requires recusal and reassignment. Nothing less will suffice, and Section 170.1 of the Code of Civil Procedure requires this. The objective appearance of bias makes it constitutionally and statutorily impermissible for Judge Swope to preside over this case.

FACTUAL BACKGROUND

In November 2018, a Committee of the U.K.'s Parliament issued and served several duly authorized Parliamentary subpoenas on Plaintiff while its Principal (Theodore Kramer) was travelling in London on unrelated business. Nov. 26, 2018 Decl. of T. Kramer (hereafter "Decl. of T. Kramer"), ¶¶11–14, Exs. 7, 8, 9. Pursuant to the stipulated Protective Order governing the information in question (the "Protective Order"), prompt written notice thereof was given to Facebook. Nov. 26, 2018. Decl. of D. Godkin, Ex. 2. Despite its presence in the U.K., Facebook took no action in Parliament and no action in any of the U.K. courts. Nor did it provide advice or any response to 643 or its former counsel. Following the repeated refusal of Six4Three's Principal to comply with several Parliamentary subpoenas and the repeated notices given to Facebook that the U.K. Parliament was seeking disclosure of information under a Protective Order of this Court, Damian Collins, Chair of a Parliamentary committee, took the unprecedented step of sending the Serjeant-at-Arms of the U.K. Parliament to personally serve Mr. Kramer with further Parliamentary Orders for production of documents. Decl. of T. Kramer, ¶13. Mr. Kramer was eventually held in Mr. Collins' Parliamentary office for several hours without counsel, without anyone from Facebook appearing, and under repeated threats of detention and incarceration for contempt of Parliament. Decl. of T. Kramer, ¶¶17–18. Without advice from counsel or Facebook, or any intervening acts by Facebook despite the repeated advance notices it received, Mr. Kramer eventually turned over electronic data on his computer to Parliament to comply with the U.K. subpoena, which remains to this day unchallenged by Facebook, in order to end the

threats of incarceration, detention, and contempt by Parliament. Decl. of T. Kramer, ¶18.[1] Ultimately, Parliament, not Mr. Kramer or Six4Three, elected to seize and publish Facebook's files, as those files demonstrated to Parliament that Facebook had been and was still committing crimes and frauds against both U.K. and U.S. citizens.

Facebook has repeatedly petitioned this Court for unspecified relief as to conduct by Parliament, in the U.K., under Parliamentary Orders issued by Parliament; but, remarkably, Facebook has done next to nothing in the U.K. It seeks to avoid any adjudication of the Protective Order and principles of jurisdiction and comity that required it to take steps in the U.K prior to the disclosure of its alleged confidential information. Meanwhile, Judge Swope's conduct and comments demonstrate he is personally embroiled in this case insofar as he appears to be an accuser against Six4Three, its Principal and its former counsel ("Plaintiff's Side") rather than a neutral adjudicator of the issues before him. For these reasons, recusal and reassignment are mandatory. Cal. Code Civ. Pro. § 170.1; *In re Martin*, 71 Cal.App.3d 472 (1977).

STANDARD OF REVIEW

California Code of Civil Procedure section 170.1(a)(6)(A)(iii) mandates disqualification when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." "Impartiality" means the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind." *Haworth v. Superior Court*, 50 Cal.4th 372, 389 (2010). "A party need not show actual bias because the Legislature sought to guarantee not only fairness to individual litigants, but also 'to ensure public confidence in the judiciary.'" *Wechsler v. Superior Court*, 224 Cal.App.4th 384, 390 (2014); *see People v. Freeman*, 47 Cal.4th 993, 1000–1001 (2010) ("an explicit ground for judicial disqualification in California's statutory scheme is a public perception of partiality, that is, the appearance of bias; *see also Taylor v. Hayes*, 418 U.S. 488, 501 (1974) ("The inquiry must not be

[1] The Court must take into account that discovery occurred in this case in an electronic form and was contained in a commercial application for online cloud storage, as is typically done these days, known as Dropbox, the use of which was entirely proper, but which turned out to have had erroneous permissions settings. Mr. Kramer has testified that he did not expect to find the highly confidential exhibits Mr. Collins had requested, nor had he previously seen or accessed the folders that appeared in his search until under the pain of contempt in Mr. Collins' office. Decl. of T. Kramer, ¶18.

only whether there was actual bias on respondent's part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused" [internal citations omitted]). "[A] party has the right to an objective decision maker and to a decision maker who appears to be fair and impartial." *Wechsler*, 224 Cal.App.4th at 390. The standard for disqualification "is objective, but potential bias and prejudice must clearly be established." *In re Scott*, 29 Cal.4th 783, 817 (2003).

ARGUMENT

I. Judge Swope's Comments Establish an Objective Appearance of Bias.

A. No Adjudication Has Been Made as to Whether Any Orders were Violated.

Facebook filed an improper *ex parte* application for contempt on November 26, 2018, but has neither filed a motion for sanctions nor a proper affidavit initiating contempt proceedings against anyone on Plaintiff's Side. *See In re Koehler*, 181 Cal.App.4th 1153, 1169–1170 (2010). A proper process, including trial on these disputed issues is crucial because contempt proceedings, even in cases of civil contempt, are criminal in nature. *Raiden v. Superior Court for Los Angeles County*, 34 Cal.2d 83, 86 (1949). As such, Plaintiff's Side is entitled to Fifth Amendment rights, including to refuse to appear as a witness, and a presumption of innocence until proven guilty beyond a reasonable doubt. *In re Witherspoon*, 162 Cal.App.3d 1000, 1001 (1984).

In order for a party to be found in contempt on the basis of violation of a court order, the alleging party must prove *beyond a reasonable doubt*: (1) facts establishing the court's jurisdiction, (2) knowledge of the order disobeyed, (3) ability to comply with the order and (4) willful disobedience of the order. *Koehler*, 181 Cal.App.4th at 1160 [emphasis added]. As noted above, the process to even begin this showing has not been initiated, but Judge Swope has already concluded that "***what could not have been done through the front door was done through the back door***." December 7, 2018 Transcript, Declaration of Matthew J. Olson (the "Olson Decl."), Ex. 2 at 43:16–44:8. Whether anyone on Plaintiff's Side violated any Court Order remains disputed. Adjudication of these issues requires proper sanctions or contempt procedures and, given the many disputed issues of fact, a trial.

B. Section 16 of the Protective Order May Provide a Complete Defense to Facebook's Claims, But Judge Swope Has Not Adjudicated the Issue.

A newly assigned judge should take up adjudication of the above issues if Facebook files a motion, a request for an Order to Show Cause, or initiates some other proceeding that addresses the November 2018 events in London that remain unadjudicated. This might include whether Mr. Kramer's disclosure was pursuant to Section 16 of the Stipulated Protective Order ("Section 16"). It may also address why Facebook took no action in the U.K. until after the disclosure had occurred, despite having offices in London and receiving prompt notice of the subpoenas. Section 16 specifically contemplates a subpoena of confidential information, and provides:

> If a party is served with a subpoena or court order issued in other litigation that compels disclosure of any Confidential Information or Highly Confidential Information, the receiving party must:
>
> a. promptly notify in writing the designating party. Such notification shall include a copy of the subpoena or court order;
> b. promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Stipulated Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and
> c. cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose Confidential Information or Highly Confidential Information may be affected.

Stipulated Protective Order, ¶16. Upon first hearing that Mr. Kramer had been subpoenaed, Plaintiff's counsel promptly initiated this process. Nov. 26, 2018 Decl. of D. Godkin, Ex. 2. Instead of performing their obligations under Section 16, and notwithstanding their formidable presence in the U.K. (including a senior executive who is a Member of the House of Lords, and an office approximately one mile away from Parliament), Facebook did not take any action. Instead, it immediately asked the Court for expedited briefing regarding an "imminent violation of the protective order." Nov. 20 Order, Ex. 1. It took two more subpoenas, unprecedented personal service by a Parliamentary Serjeant-at-Arms, and threats of detention and contempt of Parliament over the course of an additional two days before Mr. Kramer was finally coerced to disclose Facebook's alleged confidential information. Facebook took no action in the U.K. during the critical period in which Mr. Kramer refused to comply with Parliament's subpoenas, notwithstanding it received immediate notice of each subpoena. Decl. of T. Kramer, ¶17.

In light of the extraordinary circumstances surrounding the disclosure, as well as its own failure to uphold its obligations under the Protective Order, Facebook cannot make the showings of ability to comply or willful violation it is required to make in order to secure a finding of contempt of court. At a minimum, the Court was required to provide a proper process to adjudicate these issues. Instead, Judge Swope's comments indicate he has presumed everyone on Plaintiff's Side to be guilty and objectively appears to have determined for himself that everyone on Plaintiff's Side willfully, knowingly and deceptively commandeered Parliament to consummate a multi-year criminal conspiracy to embarrass Facebook.[2]

C. Irrespective of the Still-Disputed Facts, Judge Swope's Conduct and Comments Objectively Appear to Reflect Prejudgment of the Issues.

Judge Swope has repeatedly expressed that Plaintiff's Side is guilty of Facebook's "accusations" (without ever being charged). No substantive motion, and no written ruling has yet been made on any of the elements of proof (required to be established by Facebook) or any of the elements of defenses (asserted by Six4Three) as to whether Six4Three's compliance with the U.K. Parliament's subpoena and subsequent contempt citation was in fact a violation of the Protective Order. How can this be so?

Judge Swope made numerous scathing remarks predetermining not only the guilt but also the motives and mental states of Plaintiff's Side and asserting, without due process, that Plaintiff's Side intended to deceive and trick him in response to his decision to seal Facebook's allegedly confidential files. Judge Swope's remarks make it clear that he is a participant in these proceedings who no longer appears neutral. As such, Section 170.1 requires his disqualification.

1. Judge Swope's Comments at the November 30, 2019 Hearing.

Judge Swope initiated the hearing of November 30, 2018, the first after the events in London, by ordering Mr. Kramer to take the stand, having his clerk swear him in, and personally questioning him, asking him to attest to the accuracy of his Declaration filed November 26, 2019, and asking him

[2] Notwithstanding that no adjudication of Protective Order violations has occurred, Judge Swope has ordered a third party forensics firm that he admits is a "consultant to Facebook" to seize and copy all the electronic devices, email accounts, files, and phone records of Six4Three's Principal and a member of its legal team containing all of their private personal, financial, medical, marital, corporate and legal records for the past 15 years. Olson Decl., Ex. 6, 5:17–24

whether he had brought the laptop from which he transferred Facebook's alleged confidential information to Parliament with him to Court. Judge Swope concluded his questioning by stating: "That's all I have to say before the arguments begin except that when I issue a valid court order governing the conduct of the parties in this case or any other such court order, I expect those orders to be followed. I do not expect a compromise of the integrity of this judicial system which has been done." Olson Decl., Ex. 1, pg. 5:21–26.

Later, Judge Swope independently made the supposition that "This whole disclosure of documents took place interestingly during the Thanksgiving Holidays when the courts were not in session and lawyers were unavailable…I just find that rather ironic or rather interesting." Olson Decl., Ex. 1, pg. 38:15–21. Near the end of the hearing, he referred to Mr. Kramer, stating:

> I must say, however, what happened is unconscionable. It shocks the conscience. And your conduct is not well taken by this Court. It's one thing to serve other needs that are outside the scope of this lawsuit, but you don't serve those needs or satisfy the curiosities of inquiring parties when there's a court order preventing you to do so. It is rather curious that the same laptop that was used to download onto a thumb-drive confidential information subject to the protective orders of my subsequent orders to seal is not available in this court today. It was available to the House of Commons DCMS but not to me.

Olson Decl., Ex. 1, pg. 50:12–25. After additional argument from Counsel for Facebook, Judge Swope concluded: "The ends do not justify the means. Particularly when my Orders are violated in relation to this case." Olson Decl., Ex. 1, pg. 52:16–18. Judge Swope's comments on November 30, and especially his unequivocal statements that Mr. Kramer violated a court order rise above mere hostility to demonstrate a clear appearance of bias and prejudgment on the substantive and unadjudicated issue of whether the London events did indeed represent a violation of the Court's Orders and, if so, whether such a violation was willful.[3] These statements alone require Judge Swope's disqualification, and all his Orders since should be vacated as a matter of law. *Hayward v. Superior Court*, 2 Cal.App.5th 10, 42 (2016).

[3] Judge Swope reiterated his prejudgment that Plaintiff undertook purposeful, premeditated action to violate the Court's Orders when he asked at the December 7, 2019 hearing: "***When did the plan to disclose this confidential information begin? That's what Facebook is inquiring on. That's what this Court wants to know.***" Judge Swope apparently presumes guilt regarding a long-standing, willful and malicious conspiracy to violate his Orders based solely on Facebook's accusations and without any proper adjudication of the issues of fact and law.

2. Judge Swope's Comments at the March 13, 2019 Hearing.

Judge Swope reserved some of his strongest comments prejudging the guilt of Plaintiff's Side for the hearing of March 13, 2019 concerning Plaintiff's former counsels' Motions to be Relieved as Counsel. Early in the hearing, counsel for Third Parties Kramer and Thomas Scaramellino referenced Koehler to point out proper procedure for contempt proceedings, to which Judge Swope responded: "I read that case. I read it right before or right after I became a judge. There is no contempt order that's being issued. So what's the basis for the reference?" Nonetheless, Judge Swope went on to comment on his interpretation of the London events:

> I have read several documents now and I reread some declarations. ***And without passing judgment or making a ruling on what you're saying, it appears based upon what I have read that the disclosure of those documents was t'd up weeks before. Maybe even months before the actual disclosure.*** And it appears that Mr. Kramer had the confidential information by at least November 2nd which is long before. At least two weeks before the letter started coming from [Parliament]. That's just what the declarations about what the emails say, which are really inconsistent with the declaration.

Olson Decl., Ex. 4, pg. 22:10–21 [emphasis added]. Judge Swope then went on to state:

> First of all, I'm sure all counsel in this room will agree that violation of the stipulated protective order and also my motion to seal order is unprecedented. Nothing with the scope of this violation has ever happened. It's not there. There is no case law on this. This is unprecedent [sic]. This is a case of first impression. Especially with the breadth of the effect of this disclosure, this violation. This violation has resulted in repeated circulation of highly confidential and confidential information worldwide. And Facebook from what I've read wants to stop that. That's the first thing that has to be addressed. Everything that flows from this as to whether or not there should be discipline or punishment or determining whether there was a voluntary disclosure is something that Facebook is seeking now.

Olson Decl., Ex. 4, pg. 26:7–21. As previously noted, the issue of whether there *was* a violation of the Protective Order remains disputed, unbriefed, and unadjudicated, and, indeed, counsel for Mr. Kramer and Mr. Scaramellino had specifically brought up Section 16 at the March 13 hearing prior to the above remark. Judge Swope's comments to the contrary create a strong objective appearance of prejudgment. More pernicious yet, his statement that "everything that flows from this as to whether or not there should be discipline or punishment" indicates a conception that unadjudicated issues are as good as decided, and the contempt or sanctions proceedings are to function more like a sentencing hearing, to determine the scope and nature of punishment, not guilt or innocence.

3. Judge Swope's Comments at the March 15, 2019 Hearing.

At the March 15, 2019 hearing on Facebook's Motion to Open Discovery into Plaintiff's Side's attorney-client privileged communications, following argument by Third Party counsel that Facebook was retaliating by seeking expansive discovery on unrelated matters, Judge Swope made extensive remarks about his views on the alleged violation of the Protective Order:

> It occurs to me. And I may have a tremendous grasp of the obvious. But how can any corporation counsel. I mean everyone in the room. How can any corporation have confidence to enter into a stipulated protective order for the purposes of the litigation that that confidential or highly confidential information will not be broadcast to those outside the lawsuit? How can anyone have confidence in a stipulated protective order? Everyone has entered them. I sign them all the time. And this case has been popping up in the back of my mind as I sign these stipulated protective orders in my signing responsibilities as a civil judge in this court. I'm thinking these people may have confidence that the information that they have is not going to be exposed. They've signed it. And I'm hoping that their intent is to keep everything confidential or highly confidential, as it were. This compromises the entire integrity of stipulated protective orders and by extension to American Jurisprudence. One of the tenants is keeping confidences of a client inviolate, but the other is having an understanding that counsel shall keep things confidential and behave in a manner that is appropriate under the rules of professional responsibility.
>
> . . . I'm not seeing the reverence that there is to the rule of law today. What I'm seeing is a compromise of the integrity of our litigation system, our system of justice.
>
> If lawyers cannot rely upon the agreement by another lawyer to keep things confidential pursuant to a stipulated protective order, then we've all lost. The principles of confidentiality and stipulated protective orders go beyond this case. And I will leave it at that as a result with regard to stipulated protective orders.
>
> . . .
>
> ***So that presentation that you made about Facebook, Mr. Russo, is Exhibit A for why your clients did what they did. This is their motivation for what I have read and reasonable minds may differ, but I think by at least a preponderance of the evidence and maybe in my opinion its clear and convincing that may have been the motivation to disclose that information.*** Otherwise, no one would be sending emails that capture that particular thought.

Olson Decl., Ex. 5, pg. 39:6–41:14 [emphasis added]. Not only does Judge Swope continue to assume that there was a violation of the Protective Order, he makes conclusive determinations about the mental states of *everyone* on Plaintiff's Side using the wrong evidentiary standard and prior even to the initiation of proceedings. Furthermore, Judge Swope's ruminations on this case when signing other protective orders lays bare his personal embroilment in the issues at hand, requiring his disqualification under the standard articulated in *Taylor* and echoed in *Martin*. *See Taylor*, 418 U.S. at 480

("contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in a controversy that he cannot 'hold the balance nice, clear, and true between the state and the accused.'").

4. Judge Swope's Comments at the May 10, 2019 Hearing.

At the May 10 discovery conference, Judge Swope further commented on the alleged violation of the Protective Order:

> Whether or not an order is popular and matters that are sealed are interesting and either juicy or salacious or something that should be disclosed in the minds of some that are subject to a protective order, it doesn't mean that because they are juicy and salacious and important for others to see, that they should be disclosed notwithstanding the protective order. If this is done, it will render in principal all protective orders in matters similarly situated as moot and a mere exercise. Attorneys as officers of the court have an important responsibility to respect protective orders and all other orders that are issued by the court. ***Just because Facebook is Facebook and is an unpopular Defendant, it doesn't mean that you can violate orders that are controlling information in this lawsuit. That type of conduct is repugnant to this Court. It is unconscionable. It is wrong.*** So that's all I have to say about violating court orders, but I think I had said that previously. I've said all that to say that there shall not be any further beaches of that protective order or release of any other information subject to the stipulated protective order dated October 25th, 2016, or the motions to seal orders or the motions to seal period. Does everyone understand that?

Olson Decl., Ex. 6, pg. 10:8–11:5. Judge Swope again appears to enter the minds of everyone on Plaintiff's Side without having afforded any of them an opportunity or process by which to understand the nature of any charges against them, the evidence and facts offered in support of those charges, and any opportunity to present evidence or testimony in their defense.

D. Judge Swope's Recusal or Disqualification is Required Under <u>In re Martin.</u>

In re Martin is on all fours here. In that case, Judge Norman S. Reid of the Stanislaus County Superior Court presided over contempt proceedings against William A. Martin, counsel for Defendant in the matter, concerning whether Martin had lied to the Court regarding his conversations with witness Cardenaz who missed a hearing for which he was subpoenaed to testify, causing a bench warrant to be issued in his name. *Martin*, 71 Cal.App.3d at 475. Judge Reid considered whether Martin had assured Cardenaz that he was allowed to miss the hearing in order to attend to a family emergency in Mexico, that he had stated he would vouch for Cardenaz to the Court, and that he had failed to do so. Judge Reid initially found Martin in direct contempt, but that judgment was set aside, and rehearing

was granted. *Id.* at 476-478. At the rehearing, Judge Reid made statements regarding his views on the matter, here compared against a small portion of the many remarks made by Judge Swope:

Judge Reid	**Judge Swope**
"I want to be perfectly blunt right at the very beginning, to tell you, that even if I were to find Mr. Martin were not – had not been advised by Mr. Cardenas (sic) that he was going to Mexico, that I am wholly of the opinion from what Mr. Martin has admitted and what I have heard in court that he deceived me and did so deliberately." Id., at 481.	"That's all I have to say before the arguments begin except that when I issue a valid court order governing the conduct of the parties in this case or any other such court order, I expect those orders to be followed. I do not expect a compromise of the integrity of this judicial system which has been done." Olson Decl., Ex. 1, pg. 5:21-26.
"I feel I have been deceived by Mr. Martin and that it was done deliberately. I will say as things now stand, Even after reading the affidavits that have been filed, I will go further and say that I believe that my original impression was correct as things now stand. I am prepared to receive additional evidence and to be persuaded otherwise, but I don't want to take up unnecessary time and delay proceedings." Id., at 481.	"All I'm saying is a corporation that signed an agreement to keep things that are highly confidential in place until further order of the Court or some provision of that confidentiality agreement is triggered. So that presentation that you made about Facebook, Mr. Russo, is Exhibit A for why your clients did what they did. This is their motivation for what I have read and reasonable minds may differ, but I think by at least a preponderance of the evidence and maybe in my opinion its clear and convincing that may have been the motivation to disclose that information." Olson Decl., Ex. 5, pg. 41:3-13.

In *Martin*, the Court of Appeals determined, "At the very least, these comments on their face suggest a bias and presumption of guilt against petitioner before the rehearing commenced. Thus, the comments conflict with the presumption of innocence to which petitioner was entitled." *Id.* at 481 (internal citation omitted). The Court continued: "We are persuaded by the language in Taylor v. Hayes [citation] to the effect that when a contempt hearing is continued to a later date, any appearance of bias should disqualify a judge even though the judge in fact has no actual bias against the lawyer." *Id.* at 482; *see Taylor*, 418 U.S. at 501.

Here, Judge Swope not only presumes guilt, he in fact relies on the wrong standard in concluding that everyone on Plaintiff's Side is guilty by hinging his presumption of guilt on a "preponderance of the evidence" or a "clear and convincing evidence" standard. In contempt proceedings, any determination of guilt must be established beyond a reasonable doubt. For more than eight months, Facebook has continuously threatened sanctions and contempt proceedings (even filing

a procedurally deficient *ex parte* application for contempt) while simultaneously insisting on broad discovery prior to their initiation. Facebook's unwillingness to file the required initiating affidavit defining the parameters of its charges, while continuously asserting that such an affidavit is imminent[4] amounts to a continuance of the contempt hearing to a later date, as in *Martin*. Judge Swope's conduct and comments go far beyond the statements of Judge Reid, which the District Court of Appeal held mandated disqualification. *See also Ng v. Superior Court*, 52 Cal.App.4th 1010, 1023–24 (1997).

E. Judge Swope Interferes With Six4Three's Right to Retain Counsel of Its Choosing By Requiring Retention of "Full-Scope" Counsel on Four Days' Notice Despite His Prior Order that Counsel is Only Required For Discrete Issues.

Following the events in London, Facebook manufactured a conflict between Six4Three and its then-counsel which forced a delay in these proceedings while Six4Three sought new counsel. Specifically, Judge Swope previously ordered that Six4Three "retain counsel"—an unqualified instruction to retain an attorney to represent it in the matters currently pending before the court. Olson Decl., Ex. 9 (Attachment 13 at ¶ 7); Olson Decl., Ex. 10 at ¶ 2. Six4Three did just that: it retained counsel to represent it in connection with Facebook's threatened motion for sanctions and the case management conference. *See* Notice of Limited Scope Representation, Olson Decl., Ex. 13. At the July 19, 2019 Case Management Conference Judge Swope was clear that Six4Three needed counsel to address two issues: "One, . . . with regard to any discovery that would be propounded; and second, as to any contempt or sanctions that will be pursued by Facebook against your client. Your client's company, okay?" Olson Decl., Ex. 7 at 28:25–29:4. But the order ultimately entered by the court on August 1, 2019, (prepared by Facebook and signed over Six4Three's objection; Olson Decl., Ex. 12) required Six4Three to retain "full-scope" counsel by August 7, just four business days later. Olson Decl., Ex. 11.

Retention of counsel under a limited scope is authorized by the California Rules of Court and is designed to allow clients of limited means the opportunity to retain counsel to assist them where they otherwise could not afford representation. *See* Cal. R. of Ct. 3.35–3.37. The Rule favors the policy that a litigant should be able to retain counsel of its choosing and on the terms acceptable to the

[4] Facebook falsely told the Court of Appeals that Contempt and Sanctions Proceedings are currently ongoing in Judge Swope's courtroom. Olson Decl., Ex. 8.

litigant and the attorney. *See, e.g.*, *People v. McKenzie*, 34 Cal. 3d 616, 629–630 (1983) (abrogated on other grounds) (quoting *People v. Crovedi*, 65 Cal.2d 199, 208 (1966)); *Maxwell v. Superior Court*, 30 Cal. 3d 606, 613 (1982) (disapproved on other grounds). The Court's order on four days' notice to retain "full-scope" counsel rather than to address the two issues discussed at the July 19 case management conference (i.e., discovery and sanctions), is not reasonable and further demonstrates Judge Swope's prejudice against Six4Three.

F. That Judge Swope Holds the Parties to Different Standards for Sanctionable Conduct and Has Received Plaintiff's Confidential Settlement Communications Would Lead a Reasonable Person to Conclude He Appears Biased.

Shortly after the London events, Facebook's counsel knowingly and purposefully submitted to Judge Swope an unredacted Confidential Settlement Communication offered by Six4Three's former counsel in an attempt to color Judge Swope's interpretation of the London events. Olson Decl., Ex. 2, pg. 3:12–21. Facebook's counsel knew such a submission was highly improper under the Rules of Evidence and Rules of Professional Conduct. So why do it?

At the subsequent hearing, counsel for Third Parties Messrs. Kramer and Scaramellino promptly pointed out the violation of California Evidence Code § 1152.2, and in response Judge Swope maintained he had not reviewed the settlement communications and failed to issue any Order to Show Cause for Sanctions against Facebook. Olson Decl., Ex. 2 at 3:22–24. This was not the first time Judge Swope let Facebook off the hook for sanctionable conduct. Judge Swope had previously issued an Order to Show Cause for Sanctions against Six4Three's former counsel allegedly for hiring a private court reporter and failing to notify the Court the reporter was on the line during a telephonic hearing. Olson Decl., Ex. 20. Once Six4Three's former counsel explained that it was Facebook who had in fact violated the rules by failing to notify the Court or Six4Three of the presence of a private reporter during the hearing, Judge Swope had nothing further to say regarding the question of sanctions. Olson Decl., Ex. 21 at 1:5–13.

Judge Swope's pattern of differential treatment of Facebook and its counsel versus Plaintiff's Side would lead a reasonable person aware of these facts to conclude that Judge Swope appeared biased in Facebook's favor.

II. The Public Nature of the Litigation Means that Judge Swope's Expressed Bias Harms the Public Perception of an Impartial Judiciary.

Because Plaintiff's allegations, if true, would have significant consequences for many government investigations and ongoing litigation into Facebook's business practices, this case has been a matter of public concern for a number of years. Long before the events in London, virtually every major news organization had covered the case. The Court even received briefing from the Open Markets Institute, *The Guardian*, *CNN*, *The New York Times*, *The Associated Press*, and *The Washington Post* to unseal evidence in the litigation, a rare occurrence in Superior Court. Because of the ongoing media coverage of the case, all of Judge Swope's remarks took place in a courtroom in which members of the media were present and reported on the comments, noting the apparent bias of Judge Swope or making false conclusions regarding the proceedings due to Judge Swope's prejudgment.

A. Public Confidence in the Judiciary Requires Recusal and Reassignment.

Public confidence in the judiciary may be irreparably harmed if a case is allowed to proceed before a judge who *appears* to be biased. *Weschler*, 224 Cal.App.4th at 391. The appearance of integrity has consequences for the San Mateo Superior Court far beyond this case in light of the venue selection clause in Facebook's Terms of Use requiring all state-court litigants to resolve disputes in San Mateo. If everyone has to fight Facebook in its own back yard, it is critical that the back yard is viewed by reasonable members of the public as a place where a fair fight can take place. Given the volume of Facebook-related cases this Court hears, the public perception of an unbiased San Mateo Superior Court is paramount.

B. Press Coverage of Judge Swope's Remarks Proves a Public Perception of Bias.

Judge Swope's comments caused a number of organizations to report that Mr. Kramer had violated court orders, despite no such findings being made. *Palo Alto Online* reported: "Judge Raymond Swope, who had issued a court order that the documents be sealed, called together the legal counsels for Facebook and Six4Three the afternoon of Friday, Nov. 30, to find an answer to that very question: Why and how had his court order been violated?" Olson Decl., Ex. 15. An article by *Fortune* compounded the prejudice to Plaintiff's Side by inaccurately reporting that "the co-founder of a

software company was ordered by a judge to surrender his laptop to a forensic expert after admitting he turned over confidential documents about Facebook Inc. to the U.K. Parliament *in violation of a U.S. court order*," going on to state, "Facebook wants [Mr. Kramer's laptop] to determine what happened in the U.K., [and] *to what extent the court order was breached*." Olson Decl., Ex. 16 [emphasis added]. A similar statement was made in reporting by *The Telegraph*, which reported that "[Judge Swope's] ruling may shed new light on how damaging internal emails between Facebook staff were given to a Parliamentary committee *in defiance of a US court order*." Olson Decl., Ex. 17.

Moreover, Judge Swope's remarks expressing his outrage and apparent presumption of guilt have caused media outlets objectively reporting on the case to effectively describe Judge Swope as biased. For instance, a December 1, 2018 story in *The Guardian* titled "California judge condemns startup for giving secret Facebook papers to UK" reports: "A California judge sharply criticized the legal team of the app developer that turned over confidential Facebook documents to the British parliament, accusing the attorneys of behavior that 'shocks the conscience.'" The report goes on to quote from Judge Swope's remarks discussed above, noting:

> Swope repeatedly admonished Six4Three and its legal team, questioning why Kramer had access to the records. The documents were provided to Six4Three's lawyers during discovery, but should not have been shared with Kramer, according to the judge's protective order. 'When I issue a valid court order governing the conduct of parties in this case or any such court order, I expect these orders to be followed. I do not expect a compromise of the integrity of this judicial system, which has been done,' he said. 'The ends to not justify the means, whatever you're trying to accomplish.'

Olson Decl., Ex. 18. Reporting from *Ars Technica* on the hearing quoted *The Guardian*'s article and highlighted the same quotes, further adding "The judge slammed Kramer's lawyers, expressing amazement that not only had Kramer been improperly given access to the files due to an apparently misconfigured Dropbox app, but that he handed over the files to British authorities seemingly without his lawyers' knowledge or approval." Olson Decl., Ex. 19. When major media outlets, which have strict editorial processes to ensure objectivity, report that a Judge was skeptical and "expressed amazement" at the explanation by Plaintiff's Side *in the absence of any actual adjudication of that explanation*, an objective appearance of bias is established.

C. Judge Swope's Comments Undermine the Constitutional Right to a Presumption of Innocence and the Appearance of Impartiality.

Judge Swope's comments, rehashed in the media, demonstrate to the public a probability of bias in the adjudication of the current proceedings and threaten to harm the public perception of this Court's impartiality. His comments have already been misinterpreted by various media outlets to indicate that such an adjudication has *already taken place*. That multiple media outlets have falsely reported that the Court *ruled* that Mr. Kramer had violated the Protective Order is perhaps the clearest demonstration that Judge Swope is not "a decision maker who *appears* to be fair and impartial." *Wechsler*, 224 Cal.App.4th at 390 [emphasis added]. This fact alone definitively establishes the appearance of bias, if not a substantial risk of actual prejudice, that mandates disqualification under Section 170.1.

CONCLUSION

Section 170.1 provides that a judge shall be disqualified if a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." This is not a recommendation, but a requirement. Section 170.1 is not invoked lightly, but its appropriateness to the present case cannot be denied. Regardless of whether or not he is actually biased, the multitude of comments made by Judge Swope with regards to the alleged and still disputed violations of this Court's Orders display apparent bias and partiality against Plaintiff's Side, indicate prejudgment of issues integral to this dispute, and undermine the constitutional rights of everyone on Plaintiff's Side, as well as required procedure under California law. *Koehler*, 181 Cal.App.4th at 1158–59. They also demonstrate that Judge Swope has become so personally embroiled in the matters currently before the Court that he cannot continue to preside over this case. Judge Swope's pattern of apparently biased comments is especially troublesome given the public nature of this closely watched litigation. This Court cannot risk the public perception of its impartiality, especially in light of the fact that no prejudice will result to either party by assigning the case to another judge. Judge Swope must either recuse himself or be disqualified from adjudicating this matter under California and United States law.

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